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Deaccessioning and Donor Intent - Lessons Learned From Fisk's Stieglitz Collection

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Thank you for the invitation to be a speaker at this excellent program. It is an honor to be with such an impressive group of lawyers who know much more about this area than I do. Let me express particular thanks to Jim Tierney for his outstanding work here at Columbia and for the National Association of Attorneys General, where he is our counselor, guide and guru. And let me thank Janet Kleinfelter, Deputy Attorney General in my office, who leads our work supervising charities and nonprofits and who did an outstanding job on the Stieglitz case.

When I became Attorney General in 2006, I understood that the job covered a wide range of issues. But I did not expect to spend the next 5 ½ years litigating over an art collection. As a result of that experience, you have asked me to talk about "Deaccessioning and Donor Intent – Lessons Learned from Fisk's Stieglitz Collection." In our case, the donor was one of the most famous and influential American artists of the 20th century, Georgia O'Keeffe. O'Keeffe once said "I found I could say things with color and shapes that I couldn't say any other way ... things I had no words for." But when it came to her intentions in making charitable gifts, O'Keeffe did not rely on color and shapes. She used words that communicated her intent, we thought quite clearly.

The gift that was the subject of this dispute was 101 paintings, mostly American modernist art from the priceless art collection assembled by O'Keeffe's late husband, Alfred Stieglitz. It is no exaggeration to say – in fact our expert testified – that there is no comparable collection of art from that period in the South.

When O'Keeffe gave the Stieglitz Collection to Fisk University in Nashville, she insisted on a number of conditions controlling the Collection's display and care. But, for purposes of the litigation, the most important condition was the following, from her letter to Fisk on June 8, 1949: "It is my understanding that Fisk University will not at any time sell or exchange any of the objects in the Stieglitz Collection." In response, Fisk's president wrote her back on June 13, 1949, and stated: "Fisk University will not at any time, sell or exchange any of the objects in the Stieglitz Collection."

* Attorney General, State of Tennessee; these remarks were delivered at the February 7-8, 2013 Charities Regulation and Oversight Project Policy Conference.

Fisk is a highly respected historic black university that was founded after the Civil War. Due to its small size, it has faced financial challenges throughout its history. (As an aside, I would note that Fisk has a new president who started this month and who seems well suited to lead the university through its current financial troubles.) Despite these financial problems, for a long time Fisk refused to consider trying to sell the Collection, but that attitude had changed by 2005. That year, Fisk initiated litigation to deaccession part of the gift and to use the proceeds to fund the general operations of the university. The litigation ran a fairly complicated course. Ultimately Fisk filed a *cypres* petition seeking the sale of a half interest in the Collection to the Crystal Bridges Museum in Bentonville, Arkansas. After a trial in 2010 and appeal, the sale to Crystal Bridges Museum was approved by the state courts, and the transaction closed last year.

Deaccessioning is, of course, a controversial practice in the museum community. The American Association of Museum Directors (AAMD) has taken a strong position that deaccessioning, while permissible, can be done only to improve the quality of the museum's collection. According to the AAMD, proceeds from such sales can only be used for acquisitions or direct care of the collection and should never be used for operations or capital expenditures. Accordingly, the AAMD said it was "extremely concerned" by the Tennessee court ruling. Allowing an institution to sell art and use the proceeds to fund general operations "undermines the institution's public trust, service to its community, and the relationship between museums and their supporters."

Of course, attorneys general do not enforce AAMD policy. In fact, in many instances of deaccessioning, the attorney general has no role to play. Where the asset at issue is an unrestricted gift, the attorney general has no jurisdiction over its sale, except in the rare case in which the sale might trigger review under the Tennessee Non-Profit Corporations Act.

But where the asset is a restricted gift, as it was in the Stieglitz case, then the attorney general has a significant role to play. In Tennessee, it is the attorney general's responsibility to protect the public interest in that restricted gift either under the Uniform Trust Code (for charitable trusts) or the state's Charitable Beneficiaries Act (which governs charitable gifts). In those instances, the attorney general shares the concerns expressed by the AAMD about protecting the community's interests in the asset and the relationship between the institution and its donor.

From the attorney general perspective, when a donor expressly intends for an art collection to benefit the community, then conversion of that collection into cash for general operations deprives the community of the cultural enrichment provided by the collection. And when potential donors see that express instructions are not followed, then they are more likely to take their gifts to another jurisdiction, or not make a gift at all. Accordingly, attorneys general have an important role to play in protecting and enforcing donor intent, so that the citizens in their jurisdictions can continue to enjoy the benefits of existing gifts as well as the flow of future gifts.

What are some of the lessons to be learned from the Stieglitz case? Let me touch on a few. The first point is an obvious one – as you get further removed from the date of the gift,

litigation concerning the terms of the gift becomes more difficult and challenging. Conditions and institutions often change, and the principal actors involved in the original gift may not be around to give direction about their wishes and agreements. For example, during earlier periods of financial struggles at Fisk, O’Keeffe asked the university if it wanted to give up the Collection, and in fact she took the Collection back for several years. But O’Keeffe died in 1986, so she was not available to talk about her intent during the lawsuit. And all of the relevant players at Fisk were deceased.

We did have however, an active successor-in-interest to O’Keeffe, and that leads to my second point – the ambiguous role that the donor’s heirs or successors play in litigation of this type. The successor-in-interest to the O’Keeffe estate, the O’Keeffe Museum in Santa Fe, New Mexico, intervened early in the lawsuit, seeking to represent the donor’s interests and claiming that the entire gift should revert to the estate, that is, to the Museum. The Tennessee Court of Appeals did not agree and dismissed the Museum for lack of standing. But this happened only after four years of litigation, in which the Museum and the Attorney General had different ideas about protecting the public interest.

A third point – another factor making this a complex case, and that you should watch for in similar cases, is that it crossed state lines. Although the gift was made to Fisk, a Tennessee non-for-profit corporation, the lawsuit was governed by New York law. This is because the gift was made as part of the disposition of Alfred Stieglitz’s will, which was probated in New York. Therefore, any attempt to modify the donor’s intent was controlled by New York’s *cy pres* law. Accordingly, we had Tennessee attorneys and courts, after wrestling with choice of law, trying to understand and apply the law of New York.

A fourth point – interestingly, there was also a federal law angle to this case. I know this seems counterintuitive, as the laws governing charitable trusts and gifts are the province of the states. But concerns about federal bankruptcy law played a significant role and should be kept in mind in any *cy pres* case involving an institution facing financial difficulties. In a nutshell, the issue is this. Under federal bankruptcy law, restricted gifts are not considered to be assets of the institution that “owns” them. So if that institution goes into bankruptcy, the restricted gift is not part of the bankrupt estate and is not distributed to the institution’s creditors. Rather, the disposition of the restricted gift is left to the relevant state court, applying *cy pres* law. If, however, the restrictions are removed to allow the institution to monetize a gift to fund general operations, then there is a risk that a federal bankruptcy court will no longer view the gift as separate from the institution’s assets and will include it as part of the bankruptcy estate. The trial court in our case appeared to grapple with this issue, as did Crystal Bridges Museum.

Which leads me to my next point – while the courts allowed the sale of the Collection to proceed, we were still able to use our supervisory authority to protect donor intent in several important respects. First, we successfully opposed two efforts to settle this dispute by breaking up the Collection and allowing the individual sale of its two most significant pieces of art. Second, the court agreed with several objections we raised to the sale agreement that would have divested Tennessee courts of their jurisdiction over the Collection, and those provisions were changed.

Third, we negotiated additional changes to the transaction with Crystal Bridges Museum that were designed to protect the Collection as much as possible from creditors, either now or in the future. These included

- Placing \$4 million of the \$30 million sales price into a trust fund controlled and administered by the Community Foundation of Middle Tennessee, the proceeds of which can be used solely for the "case, display and protection" of the Collection.
- Transferring ownership of the Collection from Fisk and Crystal Bridges to a newly created Tennessee limited liability company - the "Stieglitz Art Collection LLC."

This was done to impose an additional layer of insulation between the Collection itself and Fisk's creditors. Fisk and Crystal Bridges each own 50 percent of the LLC. The LLC's operating agreement contains specific restrictions on the ability of either member to transfer its ownership interest in the LLC and prohibits either member from subjecting its interest in the LLC to any mortgage, pledge or lien.

My last point: Because the practice of deaccessioning is controversial, these cases can generate considerable publicity. That was true of our case. I was a newspaper reporter before I went to law school, so I can speak with some authority on this point: You should not assume that most reporters have a deep knowledge of *cypres* law. I would recommend that anyone involved in litigation of this type spend some extra time with the media, not to plead your case, but to educate them about this area of law. Our office's role in the Stieglitz case was to protect the public's interest, and part of that responsibility was to help the public, through the press, understand what was going on.

Thank you again for this opportunity. Let me stop here and take questions.